BRIEF IN SUPPORT OF PETITION

POINT I

The decision below in the Second Circuit is in substantial conflict with another Circuit or Circuits.

The Circuit Court erroneously declared the second paragraph of Article 47 of Regulations 80, which is printed in the foregoing petition at page 4, to control the case.

The Circuit Court declared (p. 974):

> "The situation comes within the second paragraph of T. R. 80, Art. 47 providing that if the gift may be diverted in whole or in part by the exercise of a power by the legatee, devisee, donee or trustee to a use or purpose which would have made it not deductible had the testator so provided directly in his will the 'deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.' This regulation has long been in effect and must be taken to have been approved by Congress since it has reenacted the deduction provisions of the statute without changing the effect of the regulation. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 59 S. Ct. 423, 83 L. Ed. 536. It stands as the law which controls the present situation."

The Court clearly misconstrued the paragraph, which in terms as well as reasonable intendment applies to a power in the transferee of a fund, whether such transfer be by legacy, devise, in trust, or by gift, including *inter vivos* gifts of a testamentary character. The purpose of the paragraph is to preclude deduction where the trans-

feree has power to use the transferred property for a non-charitable object and thus divert it to a non-charitable use.

This reflects the purpose of Section 303(a)(3), which is printed in the foregoing petition at page 3.

Neither the testator's sister nor his nephew was a transferee of the $400,000 fund in this case. Each was merely possessed of a power of selection, designation or appointment.

In *Levey* v. *Smith* (C. C. A. 7th), 103 Fed. (2d) 643, in which this Court denied certiorari in 308 U. S. 578, a correct application is made of the rule in respect of a transferee's power to use a fund for a non-charitable use or purpose. That case involved a testamentary transfer of a remainder to a fraternal lodge, to which Section 303(a)(3) was likewise applicable. Its use of the fund was not limited by the testator to a charitable object, and the fact was shown that the lodge had both charitable and non-charitable functions. The Court therefore denied a deduction, holding that the executrix could be entitled to it only if the fund was to be used by the lodge solely for charitable purposes and could not be diverted by the legatee lodge to its private purposes.

The Court declared (p. 645), quoting in part from Section 303(a)(3):

> "And our inquiry actually reduces to determining (1) what is meant by the requirement that bequests are deductible 'only if such contributions or gifts are to be used' by the donee 'exclusively for religious, charitable, * * * or educational purposes,' * * *."

Obviously this language had reference to such power of the transferee of the fund, the lodge, to use it for and divert it to a non-charitable use.

So in the present case any question under the second paragraph of Article 47 of power to use the Lalor Fund for, and divert it to, a non-charitable use is a question appertaining not to those possessed of power to designate the particular transferee, but to the transferee itself, which here, unlike the lodge in the *Levey* case, exercises functions exclusively charitable.

In *Brown, Administrator* v. *Commissioner* (C. C. A. 3d), 50 Fed. (2d) 842, a trust deed provided for the remainder of a trust fund to be distributed upon the grantor's death as the trustees "may, in the exercise of their sole and uncontrolled judgment, deem to be wise and best, bearing in mind the ideals of said settlor * * * and * * * the ideas * * * as expressed by him from time to time." His charitable ideals and ideas were disclosed in various conversations and were held to show a charitable intent.

Although it is not mentioned in the opinion, examination of the briefs of *Brown* and the *Commissioner* shows it was conceded that the deed of trust did not restrict the discretion of the trustees to make distribution to charitable purposes and that under power so to do the greater part of the fund was in fact disposed of to private individuals and not to charities (Brown's brief, p. 9; Commissioner's brief, p. 11).

Of the remainder fund, however, approximately $200,000, plus the value of the necessary land, was appointed and distributed by the trustees to the erection of a memorial church. For this deduction was claimed, but although denied by the Commissioner and the Board of Tax Appeals, it was allowed by the Circuit Court, which reversed.

The Commissioner's brief (pp. 5-6, 14) relied upon and twice quoted the second paragraph of Article 47. Brown's reply brief (p. 3), referring to such paragraph and its precursor, stated it to be "only where a legatee or trustee

is empowered to divert the property from a charitable use to some other taxable use that charitable gifts will not be entitled to deduction." And he further there contended (p. 4) that "within the meaning of the Regulations the gift to the charities became effective when the appointment by the trustees was made."

The Third Circuit avoided the error made herein by the Second Circuit of applying a misinterpretation of the second paragraph of Article 47 as controlling the decision. It declared (p. 843) there could be no doubt that there was vested in the trustees a very broad discretion, and (p. 846):

> "* * * where a power of appointment is discretionary, the power being exercised relates back to the period of time of the settlement of the power. That is, in this case, to the date of the testator's death. Therefore, when the power was once exercised, the church took the gift from the settlor, the creator of the power, and not from the trustees themselves, for the reason that the deed created no estate in any one except through the exercise of the power to appoint under the terms of the deed. The tribunal, authorized to appoint, having exercised the power, their act relates back to the settlor and the estate passed from him, as the creator of the power, and not from the trustees."

Had the Court misapplied and misconstrued the second paragraph of Article 47 as controlling the case, as did the Court below herein, the trustees with merely their power of appointment, like the nephew and sister herein with theirs, would have erroneously been deemed to fall within the category of a transferee empowered to divert the fund, and instead of reversing the Board of Tax Appeals it is submitted affirmance by the Third Circuit would have resulted. The Court, however, avoided making such error.

In *Fidelity Trust Co.* v. *McLain* (C. C. E. Dist. Pa.), 113 Fed. 152 at 156, is cited with approval a Massachusetts Supreme Court case, *Balch et al., Trustees* v. *Shaw*, 174 Mass. 144, which presents a close analogy. There Massachusetts St. 1891 c. 425 exempted from an inheritance or legacy tax property passing "by will * * * or by deed, grant, sale, or gift, * * * to take effect * * * after the death of the grantor", if it passed "to or for charitable, educational or religious societies * * *", but subjected it to such tax if it passed to "any person in trust or otherwise", other than such societies. The grantor made a gift of a fund to take effect after death. The fund had a board, and the board was given power in its discretion to organize a charitable corporation as recipient of the gift. The power was so exercised. The question was whether the donee of the fund was the board, in which event the fund was subject to the tax, or the charitable corporation, in which event the fund was not taxable. The Court held the latter, stating (p. 148):

> "The persons composing the board of the Randall Fund were not themselves the donees. They had the power to direct the trustees to * * * cause the fund to be transferred * * * 'to any corporation * * * organized for * * * charitable purposes * * *.' This board had merely a power of appointment, and until such appointment was made and acted on there was no gift to anyone within the intent of the act. When the appointment was made, the effect was the same as if the name of the corporation had been written in the deed as the donee."

So here neither the sister nor the nephew was donee or legatee of the Lalor Fund. Its donee or legatee, upon the exercise of their designating power, was the corporate charitable foundation, or its Trustees, which was designated and to which such legacy was paid.

POINT II

The decision below is in substantial conflict with decisions of this Court establishing that as matter of public policy provisions as to tax deductions in respect of charitable legacies should be construed not narrowly but liberally.

The Circuit Court's misinterpretation and misapplication of the second paragraph of Article 47 of Regulations 80 as controlling upon this case is clearly shown in Point I.

It violated a well known principle of this Court requiring liberal construction of tax provisions regarding charitable gifts.

This Court has repeatedly declared that statutes allowing the deduction for tax purposes of charitable bequests represent liberalizations of the law in the taxpayer's favor, are "begotten from motives of public policy," and accordingly should not be narrowly construed.

> *Old Colony Trust Co.* v. *Commissioner,* 301 U. S. 379 at 383, 384;
> *Helvering* v. *Bliss,* 293 U. S. 144, at 150, 151;
> *United States* v. *Provident Trust Co.,* 291 U. S. 272 at 285, 286.

So thoroughly well established is this rule that further quotations are deemed unnecessary. The rule is enunciated, however, in the cases above cited, at the respective pages noted.

In conjunction with this rule should be mentioned the further principle that the language involved in such tax provisions should be given, not a strained, unnatural, un-

reasonable interpretation such as the Circuit Court attached to the paragraph in question, but its plain, ordinary and commonly understood meaning.

United States v. *Merriam*, 263 U. S. 179 at 187, 188.

Even if there were constructional doubts in this connection, which it is submitted there are not, they should have been resolved by the Court below in favor of deduction of the charitable legacy.

Gould v. *Gould*, 245 U. S. 151 at 153;
Lucas v. *Mercantile Trust Co.* (C. C. A. 8th), 43 Fed. (2d) 39 at 43.

The Circuit Court failed to observe and apply these principles, not only in its misapplication of Article 47's second paragraph, but also in failing to consider and apply in the petitioners' favor the first paragraph of the Article. Such first paragraph, which is printed in the foregoing petition at page 4, provides in effect that where a legacy is dependent upon the performance of some act or the happening of some event in order to become effective, the act must actually be performed or the event actually occur before a deduction will be allowed.

Although the Article thus allows for the completion of a charitable bequest by some act or event subsequent to a testator's death, no specific time limitation is provided within which such act must be performed or such event occur. Accordingly, pursuant to established principles of statutory construction, Article 47 must reasonably be construed to provide for and allow a "reasonable" time. Article 43 of Regulations 80 (1937 edition) provides that the Federal Estate Tax return in respect of a testator's estate does not have to be filed until one year from the date of

death, and Article 69 of the same Regulations provides that an extension of six months may be obtained beyond such one year period, with the further right to file supplemental information even after such extension. Consequently, the various facts relative to the valuation of a gross estate and possible statutory deductions therefrom need not formally be presented until twelve or even eighteen months after the date of death.

In the present case, by virtue of the provisions of the testator's Will, the exercise of the power of appointment necessarily had to be within one year of probate, and it was not only exercised within such limited period but was exercised, and payment made accordingly, long before the Estate Tax was the subject of a 90-day letter.

It is therefore submitted that the necessary performance was also within the time impliedly contemplated by the first paragraph of Article 47, and that the deduction claimed by the petitioners should have been allowed by the Court below as matter of law.

POINT III

The decision below is also in conflict with the policy of this Court as applied to the general subject of the certainty or uncertainty of charitable legacies, and the important question presented in this case should be passed upon by this Court and in the favorable light of such policy.

Having declared its decision controlled by the second paragraph of Article 47, and having proceeded erroneously to apply and construe said paragraph in violation of established public policy, the Circuit Court superimposed upon

such error the further error, which flowed naturally from the first, of declaring the legacy to The Lalor Foundation, Inc., too uncertain to constitute a charitable gift for the purpose of tax deduction.

This constituted a further violation of the public policy enunciated by this Court, apart from being a violation of the constructional rule mentioned in Point II.

On the question of the certainty or uncertainty of charitable legacies this Court in effect has held that where there is a possibility of a gift not going to charity, the question should be viewed in a liberal and practical manner and not narrowly or theoretically, and that where, under all the surrounding circumstances so regarded, such possibility is remote, the right of tax deduction should be deemed not defeated.

Ithaca Trust Co. v. *United States,* 279 U. S. 151.

In that case a will left a life estate to the testator's wife, with the remainder in trust to charity. The wife, however, was given the right to invade principal, thereby rendering the charitable gift uncertain. This Court held, however, that the possibility was remote and that there was a right to tax deduction, stating (p. 154):

> "There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

This language was quoted with approval in a similar case, *Lucas* v. *Mercantile Trust Company* (C. C. A. 8th), *supra,* 43 Fed. (2d) 39, at 44, and it was declared (p. 43):

> "* * * The desire of the testator is apparent. His humane purposes, after providing amply for his widow, to assist unfortunate and afflicted humanity

> should not be destroyed by a strained and almost ridiculous construction of the Will.
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> Doubts in taxing statutes should be resolved in favor of the beneficiary, *Gould* v. *Gould,* 245 U. S. 151 * * * and funds set aside by a charitably inclined testator entirely for the benefit of poor, crippled, and orphaned children, and for the support of the indigent blind, the deaf, the dumb, and the aged poor, should not be taken for taxes unless such is the clear intent of the law."

This Court, it is submitted, is opposed to having its policy in respect of charitable deductions subverted by arbitrary determinations.

> *United States* v. *Provident Trust Co.,* 291 U. S. 272 at 285, 286.

In the present case there are conjoined two factors believed to be conclusive in favor of deductibility, (a) that any possibility of the charitable legacy lapsing was precluded by timely exercise of the sister's and nephew's power of appointment within the terms of both the Will and of the first paragraph of Article 47; and (b) that as a practical matter even the original theoretical possibility was particularly remote under the circumstances which surrounded the legacy.

The general charitable intent of the testator herein was clear. He specifically gave and bequeathed the legacy to educational institutions as a class. It was not necessary for him to designate the particular institution within such class. He could properly leave such particularization to others, as he did by making the bequest to such educational institution as his sister and nephew might appoint. And when they exercised such power, as they properly did, their action related back to the death of the testator and in

legal effect was his act of testamentary disposition. Not only was the exercise of their power in accordance with his wishes; it flowed from and was done pursuant to the Will, from which alone derived the power to make it. Neither the sister nor the nephew had any estate in the fund; none was created in them or passed to or from them. The legacy passed from the testator, who created the estate, to the legatee, The Lalor Foundation, Inc., to which it was paid over accordingly.

The narrow question of the theoretical possibility of lapse is academic, in the face of such accomplished fact, and there is no valid reason why deduction should not be allowed where a charitable gift has not only actually passed to a conceded charity, but has so passed, as here, upon exercise of a power performed within a reasonable period after the testator's death and which relates back to his death.

Viewed practically, moreover, and in such manner as to conform to the policy which motivates this Court in respect of charitable deductions, it is submitted that even such theoretical possibility was remote, and that a mere remote possibility should not be deemed sufficient to defeat deductibility.

For as shown by the surrounding circumstances, as to which there is no dispute, it had long been the testator's intention to make a gift of this nature. His sister and nephew had been in intimate contact with him on the subject of his plans, both before and after his execution of the Will.

Both sister and nephew were outstanding in the educational field. She had been in it for fifty years, for twenty-three of these associated with the Federal Department of

Education, and she held various honorary degrees. The nephew held a doctorate in chemistry, had studied it extensively here and abroad, had been on the faculties of the Massachusetts and California Institutes of Technology, and had been offered professorships at the former and at Harvard and the deanship of engineering at Carnegie Institute of Technology (R. 59).

In consideration of their character, attainments in the field the testator wished to benefit, and intimacy with the testator and his intentions, the likelihood, if any, that they might permit the legacy to lapse, by inaction on their part in respect of the power which the Will gave them, was extremely remote.

Only, indeed, by applying a most narrow, impractical and illiberal test could it be assumed there was any real possibility of their acting other than they in fact did.

To such extent, therefore, as the Court below may be deemed to have applied any such test, it is submitted it acted with clear error in so doing, in addition to its other errors.

This Court, it is believed, will wish itself to pass upon this case, involving as it does a federal question of important social consequence. The question should not be left to inter-circuit conflict below and, as far at least as the Second Circuit is concerned, controlled by erroneous interpretations opposed to considerations of established public policy.

Charitable gifts should be encouraged instead of discouraged, but such gifts will be discouraged if estates are to be taxed in respect of gifts which are admittedly charitable.

The development of a trend of that nature would be particularly deplorable, it is submitted, in the world's present troubled state, and especially so in respect of gifts for chemical research, a field so important to national security and welfare.

CONCLUSION

For the reasons stated above, it is submitted that the petition for writ of certiorari should be granted.

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Respectfully submitted,

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